

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 00-52

In the Matter of )  
)  
Petition of Starpower Communications, LLC )  
Pursuant to Section 252(e)(5) of the )  
Communications Act for Preemption of the )  
Jurisdiction of the Virginia State Corporation )  
Commission Regarding Interconnection )  
Disputes With Bell Atlantic-Virginia, Inc. )  
And GTE South, Incorporated )

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Public Notice issued March 21, 2000, AT&T Corp. ("AT&T") respectfully submits these Reply Comments in support of Starpower Communications' ("Starpower's") Petition, which asks the Commission to take action under Section 252(e)(5) of the Act and assume jurisdiction over Starpower's disputes with Bell Atlantic-Virginia, Inc. ("Bell Atlantic") and GTE South, Incorporated ("GTE").<sup>1</sup>

AT&T agrees with Starpower that the Commission should act under Section 252(e)(5). The Virginia State Corporation Commission ("Virginia Commission") has expressly declined to act on these disputes, and Section 252(e)(5) requires this Commission to act in its place in such circumstances.<sup>2</sup> Indeed, the comments confirm that Starpower's petition should be granted.

<sup>1</sup> See Petition of Starpower Communications, LLC Pursuant to Section 252(e)(5) of the Communications Act (March 15, 2000) ("Starpower Petn.").

<sup>2</sup> See 47 U.S.C. § 252(e)(5) ("If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] *shall* issue an order preempting the State commission's jurisdiction of that proceeding or matter . . . and *shall* assume the responsibility of the state commission

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To begin with, the Virginia Commission filed no comments opposing Starpower's petition, and its underlying decision in this matter specifically "encourage[s] the parties to carry their requests for construction of these agreements to the FCC...."<sup>3</sup> This is thus not the typical preemption proceeding in which this Commission is asked to override a determination by a state agency. To the contrary, the Commission would be in conflict with the State commission only if it declined to exercise jurisdiction.

More fundamentally, the statutory test of Section 252(e)(5) is plainly met. No commenter disputes that, as Starpower demonstrates, the underlying proceeding is a "proceeding or other matter under . . . section [252]."<sup>4</sup> Indeed, only one set of comments – the Joint Comments of Bell Atlantic and GTE -- has been filed in opposition, and those comments rest on a single, flawed argument. Bell Atlantic and GTE contend that the Virginia Commission did not "fail to act" because it issued written decisions in these matters. On that basis, Bell Atlantic and GTE argue that Starpower's only recourse is to pursue an action in federal district court under Section 252(e)(6) for review of those "decisions."

This argument is baseless. First, the Virginia Commission's "decision" was explicitly *a decision not to act*. It held:

Therefore, upon full consideration of the pleadings, the Reciprocal Compensation Order, and the applicable statutes and rules, we find we should take no action on the petitions.

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under this section with respect to the proceeding or matter and act of the State commission") (emphasis added).

<sup>3</sup> See *Petition of Starpower Communications, LLC For Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc.*, Final Order, Case No. PUC990023 (Va. S.C.C. Jan. 24, 2000) ("Starpower/GTE Decision").

<sup>4</sup> See Starpower Petition, p. 7.

Starpower/GTE Decision, p. 7. It is absurd to suggest that a State commission's failure to act ceases to be a failure to act if the State commission expressly states that it will not act. To the contrary, such a statement removes any doubt that it has failed to act.

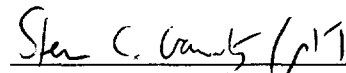
Second, consigning Starpower to federal district court in such a situation could strand it in a jurisdictional no-man's land and provide it with no forum in which to have its dispute resolved – as is apparently Bell Atlantic's and GTE's objective. Several federal courts – including one in the Eastern District of Virginia – have held under Section 252(e)(6) that where the State commission “did not make a determination regarding the interpretation of the claims,” the district court “lacks subject matter jurisdiction over th[e] dispute.” *Bell Atlantic-Virginia, Inc. v. WorldCom Technologies of Virginia, Inc.*, 70 F. Supp.2d 620, 626 (E.D. Va. 1999); *see also AT&T Communications of Illinois v. Illinois Bell Tel.Co.*, 1998 U.S. Dist. LEXIS 12925 (Aug. 18, 1998) (“plaintiff's request would require this court to review issues that were not the subject of the ICC's determination. Accordingly, this court finds that subject matter jurisdiction is lacking”); *Indiana Bell Tel.Co. v. McCarty*, 30 F. Supp.2d 1100, 1104 (S.D.Ind. 1998) (same). Because the Virginia Commission expressly declined to make a determination here, a District Court that followed those holdings might well dismiss these claims.

Moreover, even if the District Court did not follow those holdings in this instance, action by this Commission would still be necessary. Bell Atlantic's and GTE's claim that no special expertise will be required to resolve this dispute – merely “traditional standards of contract interpretation and construction” (pp. 3-4) – is nonsense. The Virginia Commission declined to make its own determination because it concluded that

the issues in these disputes are closely related to other matters pending before this Commission and present the potential for conflicting decisions on matters that require nationally uniform and consistent treatment by a single, expert regulatory agency. The District Court would be unlikely to conclude that its expertise on such matters exceeds that of the Virginia Commission, and would almost certainly refer the matter to this Commission under the doctrine of primary jurisdiction. *See Far East Conference v. United States*, 342 U.S. 570, 574-575 (1952).

Thus, the inescapable reality is that, because the Virginia Commission has declined to decide these issues on the ground that it would defer to this Commission, this Commission will have to decide them. And in addition to the fact that Section 252(e)(5) requires the Commission to take jurisdiction as a matter of law, that provision also provides the most direct means for accomplishing that inevitable result.

Respectfully submitted,



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April 14, 2000

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of April, 2000, I caused true and correct copies of the foregoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: April 14, 2000  
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Peter M. Andros

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